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No. 95-1244

In The

SUPREME COURT OF THE UNITED STATES

October Term 1995

ENRIQUE RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES, *et al.*,

Respondents

ON PETITION FOR A WRIT TO CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), the United States Supreme Court recognized traffic stops are high-risk situations for police officers not because drivers are presumed dangerous but because the car conceals its occupants and weapons are easily hidden within a car. As such, the court gave officers the discretion to have drivers exit the car. Did the Ninth Circuit in *Ruvalcaba* correctly determine *Mimms* applies to passengers because its rationale logically encompasses all of the vehicle's occupants?

2. Should certiorari be granted where, as petitioner himself acknowledges, there is no conflict between the Court of Appeals on the issue of whether *Pennsylvania v. Mimms* should apply to passengers?

3. At best, there are only three opinions from state courts of last resort that have declined to adopt a per se rule extending *Mimms* to passengers. Those cases all set out minimal standards an officer must meet before asking a passenger to step out of the car; and under any of those standards the outcome of this case would be the same. Should certiorari be granted under these circumstances?

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Respondents, the City of Los Angeles, *et al.*, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995).

SUMMARY OF ARGUMENTS

With logic, legal authority, and an accurate view of reality on its side, the Ninth Court issued an opinion ruling that because officer safety during traffic stops is a legitimate and weighty concern, an officer *may* ask a passenger to step out of a lawfully-detained vehicle without having probable cause or a reasonable suspicion of criminal activity. In the final analysis, there can be no doubt that officer safety far outweighs such a *de minimis* intrusion on passengers.

The Ninth Circuit's basic premise that the reasoning in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), applies to passengers as well as drivers rests on impenetrable logic. The inherent danger in making a traffic stop has nothing to do with the fact that the driver may have committed some minor traffic offense. Traffic stops are risky because the vehicle partially conceals the occupants from the officer's view and occupants can easily access weapons without being seen.

Nor is the Ninth Circuit's application of *Mimms* to passengers in conflict with any other circuit opinion.

To the extent there is any divergence between state courts of last resort, those three cases unwilling to extend *Mimms* to passengers nevertheless conclude the police must meet only minimal standards before asking a passenger to step out of a car.

Under those standards, the officers here were completely justified in asking passenger Ruvalcaba to exit the car. The stop occurred at 1:30 a.m. in a high-crime area. The driver chose to pull over on a dark side street and one officer had recognized Ruvalcaba as a robbery suspect he had chased two years ago at the exact same location. The officers also knew Ruvalcaba -- one of the vehicle's three occupants -- as a man who had been involved in criminal activities.

By any standards, the outcome in this case is correct and the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

1. Proceedings Below

Enrique Ruvalcaba [Ruvalcaba] filed a 42 U.S.C. § 1983 complaint against the City of Los Angeles, the Chief of the Los Angeles Police Department, and individual officers, claiming unlawful detention.

The case was tried against the individual officers, with the jury finding the officers did not cause Ruvalcaba "to be

deprived of his constitutional rights." Ruvalcaba's motions for new trial and judgment notwithstanding the verdict were denied.

The Ninth Circuit affirmed. (Petition, Appendix A). Ruvalcaba filed a petition for rehearing and suggestion for rehearing en banc. Both were denied on November 3, 1995; no judge in active service requested a vote to hear the matter en banc. (Petition, Appendix C, p. 18a).

2. Statement of Facts

Two Los Angeles Police Officers, with 38 years of experience between them, were patrolling at approximately 1:30 a.m. in February of 1991. They spotted a car -- driven by Enrique Ruvalcaba's brother -- fail to stop for a stop sign at an intersection near a convenience store. Officers John Backus and David Jacoby decided to stop the car.

But first they followed the car, using the time to run the license plates. They also drove alongside of the vehicle because they could see several heads and wanted to determine how many people were in the car before they stopped it. There were three occupants, including Enrique Ruvalcaba who was the passenger in the front seat.

Officer Backus recognized Ruvalcaba as a man with whom he had had many prior encounters. He also knew of Ruvalcaba's criminal activities.

Some two years earlier at 2:30 a.m. at the same location

near the convenience store, Officer Backus spotted Ruvalcaba in a dark alley. Suspecting Ruvalcaba had been involved in a burglary, the officer followed him. Ruvalcaba ducked into a dumpster and then tried to flee but he was eventually taken into custody.

Based upon Officer Backus' knowledge of Ruvalcaba's activities and his past dealings with him, he believed there was a heightened danger in stopping the car. The officers activated their red lights but the driver did not pull over to the right curb although it was the logical place to stop. Instead he continued driving, eventually stopping on a poorly-lit side street.

Officer Backus was concerned the driver was controlling the situation by picking where he wanted to stop. The officer believed the driver might be setting them up by committing a traffic violation to draw them to an area where other people would be lying in wait for the officers.

Given all this, Officer Backus feared for his and his partner's safety. He decided the safest way to handle the situation was to have all three occupants exit the car.

The officers got out of their car and Ruvalcaba's brother and the other passenger, Salvador Haro [Haro], obeyed the officer's request to step out of the car and walk over to the sidewalk. The brother and Haro, a convicted felon, both admitted they gave the police false names because they thought there were warrants out for their arrest.

After those two were standing on the sidewalk, the

officers asked Ruvalcaba to step out. Ruvalcaba immediately flung the door open, jumped out and faced them. As he stood there with both hands in the pockets of his jacket, he said loudly, "'What the fuck is going on?'" When Officer Jacoby asked him to take his hands out of his pockets and put them behind his head, he took off his jacket, threw it over the car into the traffic lane and responded, "'You put your fucking hands behind your head.'" He yelled "Fuck you" many times and advanced towards the officers.

Ruvalcaba reeked of alcohol. In Officer Backus' opinion, he was intoxicated. Ruvalcaba admitted the group had been drinking beer before they had gotten in the car. He also admitted they had stopped at the convenience store to purchase more beer.

Ruvalcaba advanced towards the officers, ignoring orders to stop. He took a boxing stance with both hands clenched in front of his chest. He continued swearing, called the officers "a couple of punks" and ignored their commands that he stop and calm down.

By now Officer Backus feared that "we were definitely being set up here for a ambush situation where our attention is diverted to Mr. Ruvalcaba and the other individuals bring harm to us."

When Ruvalcaba reached the front of the police car, he moved towards Officer Jacoby and an altercation ensued. He was taken to the hospital and treated for his injuries.

REASONS TO DENY THE WRIT

1.

CLAIMS THAT THE COURT MISAPPLIED *PENNSYLVANIA V. MIMMS* AND THAT THE COURT MADE ERRONEOUS FACTUAL FINDINGS AS TO THE DANGEROUS NATURE OF TRAFFIC STOPS ARE NOT GROUNDS FOR GRANTING CERTIORARI

In urging this Court to grant his petition, Ruvalcaba argues that the Ninth Circuit has misapplied *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), to passengers. (Petition, pp. 7-11).

He also argues the Ninth Circuit's conclusion that it may be safer for the officer to have the passengers step out of the car is unsupported by the factual record in the case. (Petition, pp. 12-15). Amicus adds that there is no factual basis for concluding that officers face heightened danger in making traffic stops. (Amicus Petition, pp. 5-15).

But Rule 10 of the Rules of the Supreme Court of the United States specifically warns, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Thus, neither a claim that the law of *Mimms* was erroneously applied nor an allegation of incorrect factual findings is grounds for granting certiorari.

THE RATIONALE OF *MIMMS* DOES LOGICALLY APPLY TO PASSENGERS

If this Court were to consider Ruvalcaba's claim that the Ninth Circuit erred in applying *Mimms* to passengers as a basis for granting his petition, the argument should fail on the merits.

Ruvalcaba argues "a close examination of the *Mimms* rationale shows it only applies to drivers." (Petition, p. 7). In fact, quite the opposite is shown upon close examination of *Mimms* as well upon review of cases documenting this Court's long-held acknowledgment that traffic stops are uniquely dangerous for law enforcement officials.

a. Traffic stops are dangerous not because drivers are unusually dangerous people but because the car conceals its occupants and is an excellent hiding place for weapons

The Ninth Circuit candidly acknowledged *Mimms* did not "control the outcome" in *Ruvalcaba*, 64 F.3d at 1327. But the court understood the central premise of *Mimms* and reached the correct conclusion that "the reasoning behind *Mimms* is equally applicable to passengers in a vehicle as it

is to drivers." *Ruvalcaba*, 64 F.3d at 1327, n. omitted.

The heart of *Mimms* is the court's finding that the unique nature of a traffic stop makes it an inherently dangerous situation. "[W]e have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile." 434 U.S. at 110.

Thus, *Mimms* never based its opinion on a finding that drivers are somehow more likely to be dangerous people because they have committed a traffic violation. Rather, the danger in making a traffic stop arises from the fact that the vehicle's occupants -- driver and passengers alike -- are largely concealed in the car so an officer cannot fully view them. And, they can quickly access weapons without being observed.

In giving officers the discretion to ask a driver step out of the vehicle, *Mimms* allowed officers to avoid "permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior. See *Pennsylvania v. Mimms*, *supra*, at 110, 98 S.Ct., at 333." *New York v. Class*, 475 U.S. 106, 116, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

As such, the occupant's status as driver or passenger is not at all critical to the reasoning of *Mimms*. The problem is the stop itself is high-risk. Thus, *Ruvalcaba* correctly determined *Mimms* logically applies to passengers.

b. The Supreme Court has long recognized that vehicle stops are high-risk situations

The Supreme Court's opinion in *Mimms* that traffic stops pose "inordinate risk" for officers did not come out of the blue. Dating back to 1972 -- long before drive-by shootings lengthened the ever-proliferating list of violent crimes plaguing this country -- this Court recognized vehicle stops are high-risk situations.

In *Adams v. Williams*, 407 U.S. 143, 148, n. 3, 92 S.Ct 1921, 32 L.Ed.2d 612 (1972), the court cited to a study showing approximately 30 percent of police shootings occurred when a police officer approached a suspect seated in an automobile.

One year later in *United States v. Robinson*, 414 U.S. 218, 234, n. 5, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the court commented "that a significant percentage of murders of police officers occurs when the officers are making traffic stops."

A few years later in *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 278 (1978), the court spoke again of the particular risks in making traffic stops. Noting that, within limits, officers could ask drivers and passengers to exit a vehicle and do pat-down searches, the court observed,

> "That this prophylactic authority is essential is attested by the number of police officers wounded or

killed in the process of making inquiry in borderline, seemingly minor violation situations for example, where the initial stop is made for a traffic offense but, unknown to the officer at the time, the vehicle *occupants* are armed and engaged in or embarked on serious conduct." 435 U.S. at 298, emphasis added.

Finally, in *Michigan v. Long*, 463 U.S.1032, 1047, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the court reiterated that in *Mimms* it had "recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers."

Thus, the Ninth Circuit surely did not "misapprehend" the Supreme Court's well-established position that it is the nature of traffic stops that make it a situation fraught with danger and not any "danger from the driver as a result of being stopped for a traffic violation." *Ruvalcaba*, 64 F.3d at 1327-1328. *Ruvalcaba* did not "misapply" the rationale of *Mimms* to passengers.

3.

THE CONCERN FOR OFFICER SAFETY DURING TRAFFIC STOPS IS STRONGLY ROOTED IN CASE LAW AND FACTUAL REALITY

Paying no heed to the Supreme Court's long-held acknowledgment that traffic stops are "fraught with danger", Ruvalcaba and amicus argue the Ninth Circuit had no factual

support for its conclusions that traffic stops are dangerous and that it is safer for an officer to have all the occupants exit the vehicle. Ruvalcaba also adds "common sense dictates it is safer to leave passengers in the car. (Petition, p. 13; Amicus Petition, pp. 5-15).

But petitioner's personal view as to what common sense dictates is hardly the basis for granting certiorari. (Petition, p. 13). Nor, as set forth above, is it the role of the Supreme Court to review a case to evaluate if the lower court's factual findings are correct.

a. *Ruvalcaba's* conclusion that officers should decide if it is safer to leave passengers in the car or to have them step out is supported by sound case law

In any event, reaching the merits of this argument, Ruvalcaba has again misconstrued the Ninth Circuit's position. The court did not rule an officer *must* have passengers step out of the car. *Ruvalcaba* expressly states officers are "not required to take this protective step. We merely hold that such a routine practice is permissible under the Fourth Amendment." 64 F.3d at 1328, n. 4.

In other words, in permitting officers to decide whether they are more comfortable keeping passengers in the car or having them exit, the Ninth Circuit elected not to substitute its judgment for that of the officers who are in a far better

position than lawyers or judges to determine the safest way to handle a stop. While the confinement of the car may bring comfort to an officer in the circumstances of a particular stop, in other situations an officer may feel far more secure distancing the passengers from the vehicle.

Interestingly, the Superior Court of Pennsylvania recently extended *Mimms* to passengers, noting "the potential danger to police increases, rather than diminishes, when passengers are present in a car." And, the "most appropriate method of mitigating that danger is to order the passengers to exit the vehicle so they can remain in full view of the officer. . . . " *Commonwealth v. Brown*, 439 Pa.Super. 516, 528, 654 A.2d 1096, 1102 (1995).

Brown is a case in point as to how the latter strategy could save an officer's life. When the officer approached the car, he was unaware there was a rear seat passenger. "That passenger had access to three loaded firearms, one of which had just been used to kill an unwitting citizen" during a robbery. 439 Pa. Super at 528-529, 654 A.2d at 1103.

Another case in point is *People v. Robinson*, 74 N.Y.2d 773, 545 N.Y.2d 90, 543 N.E.2d 733 (N.Y. 1989), *cert. denied*, 493 U.S. 966 (1989). There the officer had no particularized suspicion regarding the passenger of a vehicle stopped for a traffic violation but nevertheless had him step out of the vehicle. After the passenger door was opened, the officers spotted the butt of a loaded .357 magnum handgun "plainly visible protruding from beneath the seat."

Id. at 733. Had the officer not followed his instincts in asking the passenger to step out, the outcome of that incident could have been far different.

On balance, the New York Court of Appeals found police should not have to take that risk and also applied *Mimms* to passengers:

> "Inasmuch as the risks in these police/civilian vehicle encounters are the same whether the occupant is a driver or a passenger, 'police may order persons out of an automobile during a stop for a traffic violation.'" 543 N.E.2d at 733-734, quoting *Michigan v. Long*, 463 U.S. at 1047-1048 . . . ." citations omitted.

See also *State v. Ferrise*, 269 N.W.2d 888 (Minn. 1978), extending *Mimms* to passengers in part because "[t]he same concern of the officers for their own safety applies" while the intrusion on the passengers' rights "is no greater than the intrusion on the rights of the driver." 269 N.W.2d at 890.

Similarly, in *State v. Landry*, 588 So.2d 345 (La. 1991), the Supreme Court of Louisiana illustrated the dangers posed by passengers by discussing the facts from another case. There, after the officer had the passenger and driver exit, he spotted a sawed-off shotgun between the front seat and passenger side door. *Id.* at 346. "Ordering a passenger

out of the vehicle not only places him in the view of the officer, but also distances him from access to weapons. The justification for ordering the passenger out of the vehicle is just as compelling as the justification for ordering the driver out." 588 So.2d at 347.

In fact, as the Superior Court of *Pennsylvannia* had concluded in *Brown*, the Michigan Court of Appeal similarly reasoned,

> "[o]ne could even advance the argument that the passenger presents a greater threat to the officer than does the driver, since the officer's attention in the traffic stop is going to be focused on the driver, and he may not be immediately aware of the activities of the passenger, including the possibility that the passenger may retrieve a firearm and assault the officer." *People v. Martinez*, 187 Mich.App. 160, 466 N.W.2d 380, 384, n. 5 (1991).

The Ninth Circuit's conclusion that passengers can indeed make a traffic situation all the more dangerous and the officer should have the discretion to have them get out of the car to alleviate that risk finds strong support in case law..

b. There is a substantial factual basis for the court's conclusion that traffic stops are inherently dangerous

Amicus' inferences to the contrary, the Ninth Circuit also had substantial support in fact and in logic for its conclusion that there is very real danger involved in making traffic stops.

Amicus suggests the Ninth Circuit was "unnecessarily alarmist in its focus on the danger of police shooting." Amicus offers the opinion that "many" police officers never get shot or shoot anybody and "police work is not significantly more dangerous than the average job." (Amicus Petition, pp. 9-10).

In support of this opinion, amicus cites to statistics and newspaper articles that do not address the issue at hand and were never raised in the trial court. (Amicus Petition, pp. 8-14).

Amicus' speculates that "[u]ndoubtedly, approaching cars for minor traffic infractions is many times safer" than other types of police encounters. (Amicus Petition, p. 11, n. 8). But this Court in *Mimms* rejected just such a claim:

> "[W]e have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. [Citation]. Indeed, it appears 'that a significant percentage of murders of police officers

occurs when the officers are making traffic stops. [Citation]." 434 U.S. at 110.

Unfortunately, *Mimms'* observation rings even truer today than it did in 1977. As the court put it in *Commonwealth v. Brown, supra*, after discussing the officer's discovery of three guns in the back seat of the car -- one of which had just been used as a murder weapon:

> "It is this type of scenario which prompted the United States Supreme Court [in *Mimms*] to conclude that, in keeping with the Fourth Amendment, the interest in the safety of law enforcement officials outweighs the de minimis intrusion to the individual who is asked to step outside a lawfully stopped vehicle." 439 Pa.Super at 529, 654 A.2d at 1103.

The Seventh Circuit in *United States v. Packer*, 15 F.3d. 654 (7th Cir. 1994), has done a far better job than amicus in researching articles that accurately record the ever-escalating, frightening problem of officer safety in the relevant context of making these stops.

Packer began with the observation,

> "[i]t is a regrettable fact of life in late-20th century America that police officers justifiably are concerned for their safety, and, indeed, their lives, when they approach citizens in the course of routine traffic stops." 15 F.3d at 657, n. 2.

In support of this observation, the court cited to a newspaper database search it conducted in just the six-month period preceding the submission of that case. *Ibid.* The court's research deflates Ruvalcaba's attempts to downplay officer safety concerns during vehicle stops.

For example, *Packer* cites to the *Los Angeles Times* article of December 29, 1993, reporting the shooting death of a Manhattan Beach police officer by a motorist near a shopping mall. That article, the court emphasized, included the statistic that the officer was "one of at least fifteen officers killed or wounded by motorists in routine traffic stops over past five years in Southern California." *Ibid.*

Parker cites these additional newspaper articles that counter amicus' half-hearted attempts to suggest traffic stops pose little danger:

- a Long Beach officer was in critical condition after being shot three times during a routine traffic stop. (*Los Angeles Times*, August 11, 1993).
- a man was convicted of murder in the roadside slaying of a Virginia State trooper during a routine traffic stop. (*Washington Post*, November 17, 1993).
- a teenage convicted of gunning down a state trooper during a routine traffic stop was sentenced to death. (*San Diego Union-Tribune*, July 15, 1993).
- an officer was shot to death and his partner wounded during a routine traffic stop. (*Philadelphia Inquirer*, June 24, 1993). *Ibid.*

Packer concluded, "In light of these realities, precautionary procedures such as those employed by the officers here (the use of 'take down' lights, requests to place hands in the air, etc.) unquestionably are reasonable when making traffic stops." *Ibid.*

The Ninth Circuit also properly concluded that in light of the case law and these factual realities, the "minimal" intrusion in having to step out of the car is vastly outweighed by serious officer safety concerns and, on balance, does not violate a passenger's Fourth Amendment rights.

4.

RUVALCABA IS CONSISTENT WITH THIS COURT'S OWN INTERPRETATION OF *MIMMS*

While Ruvalcaba portrays the Ninth Circuit's opinion as a ground-breaking decision (Petition, p. 8), the Supreme Court itself has failed to distinguish between drivers and passengers in discussing *Mimms*.

In *Michigan v. Long*, *supra*, 463 U.S. at 1047-1048, the court said *Mimms* "held that police may order *persons* out of an automobile during a stop for a traffic violation . . . ." Emphasis added.

In *Rakas v. Illinois*, 439 U.S. 128, 155, 99 S.Ct. 421,

436, 58 L.Ed.2d 387 (1978), Justice Powell in his concurring opinion stated, "Last term, this Court determined in *Pennsylvania v. Mimms* . . . that *passengers* in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made." Emphasis added.

5.

RUVALCABA IS CONSISTENT WITH OPINIONS FROM OTHER COURT OF APPEALS AND DOES NOT CONFLICT WITH AN OPINION FROM ANY OTHER CIRCUIT

Ruvalcaba appears to concede there is no split of authority between the circuits of the United States Court of Appeals on the issue of whether *Mimms* extends to passengers. Therefore, this cannot be a basis for granting his petition. He states,

> "There is also no decision of the Court of Appeals holding that officers do not have the discretion to order passengers out of cars during routine traffic stops" (Petition, p. 8, n. 5).

He even identifies at least one district court opinion that "squarely" addresses the issue and holds that *Mimms* does apply to passengers. *United States v. McCoy*, 824 F.Supp. 467, 473-74 (D. Del. 1993). (Petition, p. 8, n.5).

Indeed, there are several opinions from the Court of

Appeals that are consistent with *Ruvalcaba*. As such, the Ninth Circuit is far from alone in recognizing there is no logical distinction between the potential risk posed to the officer by the driver or a passenger.

The Tenth Circuit in *United States v. Hill*, 60 F.3d. 672 (10th Cir. 1995), *cert. denied*, 116 S.Ct.431 (1995), extended *Mimms* in a case where the passenger was a "suspect," but the only thing the passenger was "suspected" of was not wearing a seatbelt. Such a violation is hardly a crime of moral turpitude nor does it give cause for an officer to automatically fear for his or her safety.

In declining to limit *Mimms* to drivers, *Hill* noted,

> "It is not apparent to us why a passenger should be treated differently from the driver of the vehicle for this analysis because the risk to the officer and the intrusion upon the privacy of the suspect will be similar whether the suspect is a driver or a passenger. Thus, we apply *Pennsylvania v. Mimms* to the situation where the passenger is a suspect." *Id.* at 682, citations omitted.

As *Ruvalcaba* notes, other circuits have extended *Mimms* to passengers, although they have done so "without significant analysis." 64 F.3d at 1327, n. 3. Nevertheless, all four opinions *Ruvalcaba* cites are completely consistent with this opinion.

In *United States v. Tellez*, 11 F.3d 530, 533 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1630 (1994), the police had no particularized suspicion that passenger Tellez, who was seated by the passenger door, was involved in criminal activity. But the court concluded, "[i]n order to safety determine if the parole violator was in the truck, it was reasonably necessary to remove Tellez."

In *United States v. Shabazz*, 993 F.2d 431, 437, n. 7 (5th Cir. 1993), the court addressed the officer's right to have the driver exit but noted, "Ordering *someone* to get out of a car is itself a seizure but a constitutionally permissible one when done incident to a lawful traffic stop. *See Pennsylvania v. Mimms, supra.*" Emphasis added.

In *United States v. Hardnett*, 804 F.2d 353, 358 (6th Cir. 1986), *cert denied*, 479 U.S. 1097 (1987), the police received information that defendant and his passengers were armed. When they stopped the car, all occupants were ordered out. The court found the seizure permissible and "[a]s an incident to this permissible seizure, the officers were permitted to order the *occupants* out of the vehicle." Emphasis added.

Finally, in *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir. 1991), *cert denied*, 502 U.S. 981 (1991), in dicta the court read *Mimms* as permitting officers to ask drivers and passengers to step out of the car.

Ruvalcaba does not and could not claim any of these four decisions "directly" conflicts with the Ninth Circuit's

opinion. Rather, he tries to distinguish them on their facts and dismiss their relevance by claiming the Ninth Circuit relied on dicta from them. (Petition, pp. 9-10). But even if they contain only dicta on this point, that dicta is completely consistent with the Ninth Circuit's holding and provides no basis for granting certiorari.

VI.

PRIOR NINTH CIRCUIT CASE LAW IS ALSO CONSISTENT WITH THIS OPINION

Not only is *Ruvalcaba* in alignment with other circuits, it is also consistent with earlier Ninth Circuit opinions.

Long before *Mimms*, the Ninth Circuit in *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971), began forging the same path of logic it has traveled in *Ruvalcaba:*

> "In it inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance. All companions of the arrestee within the immediate vicinity, capable of accomplishing harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance they are unarmed." *Id.* at 1193.

After *Mimms*, the Ninth Circuit in *United States v. Wiga*, 662 F.2d 1325 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982), looked to *Mimms* and to the language in *Berryhill* in determining that

> "[o]fficers engaged in the lawful arrest of an operator of a vehicle have a legitimate interest in seeing that the other occupants of a vehicle do not impose any danger to them while executing the arrest of the operator." *Id.* at 1332, fn. omitted.

Thus, in the context of a motor home where the interior of the vehicle was particularly inaccessible to the officer's view and there was a question as to the number of occupants, the court found no Fourth Amendment violation in ordering out the occupants. As the Ninth Circuit recognized in *Ruvalcaba, Wiga* is "of course, entirely consistent with the result we reach here." 64 F.3d at 1327, n. 3.

More recently in *United States v. Behanna*, 814 F.2d 1318 (9th Cir. 1987), the Ninth Circuit found an officer who stopped a truck for expired license plates could take the reasonable precautionary measure of asking the occupants of the truck to exit the vehicle. The vehicle registration did not match the name given by the driver and a computer check showed the passenger had a history of concealed weapon charges. While these factors gave rise to suspicious circumstances, the court did not require that the officer have

probable cause or reasonable suspicion that the passenger was involved in criminal activity before he could ask the passenger to step out of the car. *Id.* at 1321.

Again, these Ninth Circuit decisions are all completely consistent with *Ruvalcaba*.

7.

THE OUTCOME IN *RUVALCABA* WOULD BE THE SAME UNDER ANY OF THE STATE COURT CASES THAT PETITIONER ARGUES ARE "IN CONFLICT"

Finally, Ruvalcaba urges his petition should be granted because there is a "sharp conflict" between state courts "with many decisions by courts of last resort on each side of the question . . . . " He then cites nine cases that have extended *Mimms* to passengers and eight cases that he argues "reject the view that *Mimms* applies to passengers." (Petition, pp. 5-6).

But several of those cases are not at all in conflict with *Ruvalcaba* and the outcome in *Ruvalcaba* would be the same under any of their rulings.

Of those eight cases he identifies as rejecting an extension of *Mimms* to passengers:

- Three are not from state courts of last resort. *People v. Maxwell*, 206 Cal.App.3d 1004, 254 Cal.Rptr. 124

(1988); *Commonwealth v. Elliott*, 376 Pa.Super. 536, 546 A.2d 654 (1988); and *Johnson v. State*, 601 S.W.2d, 326 (Tenn. Crim. App. 1980). And, as to *Elliott*, the same court later squarely faced the issue of extending *Mimms* to passengers in *Commonwealth v. Brown, supra,* and did extend it, holding officers may ask passengers to exit "in all cases involving lawful traffic stops." 439 Pa.Super. at 528, 654 A.2d at 1102.

- Two cases expressly declined to decide the issue of whether *Mimms* applies to passengers and therefore are not, as Ruvalcaba suggests, cases that "reject the view that *Mimms* applies to passengers." (Petition, p. 5). *Bethea v. Commonwealth*, 245 Va. 416, 419, 429 S.E.2d 211, 213 (1993), "[w]e need not determine whether the de minimis rationale utilized in *Mimms* is applicable to a passenger in a vehicle when the initial vehicle stop is predicated solely on matters pertaining to the driver"; and *Commonwealth v. Elliot, supra*, declining to decide whether *Mimms* extends to passengers, but adding "the rationale used in *Mimms* would seem to suggest this result . . . " 376 Pa.Super. at 549, 546 A.2d at 660.
- Two cases address the entirely different issue of whether the police can open the passenger door. *Johnson v. Tennessee, supra*, 601 S.W.2d at 329; and *State v. Schlosser*, 774 P.2d 1132, 1135, 108 Utah.Adv.Rep. 38 (Utah 1989).

Finally, four of those cases (including *Maxwell*, which is not from a court of last resort), articulate minimal standards under which an officer is justified in ordering a passenger out of a car. Under any of those standards, the officers in *Ruvalcaba* were justified in having Ruvalcaba exit the car. *(People v. Maxwell, supra; State v. Becker,* 458 N.W.2d 604 (Iowa 1990); *State v. Smith,* 134 N.J. 599, 637 A.2d 158 (N.J. 1994); and *State v. Wilson,* 106 Md.App. 24, 664 A.2d 1 (Ind. 1995), pet. for cert. pending, 95-1268. Therefore, the outcome in *Ruvalcaba* is completely consistent with them and they offer no basis for granting certiorari.

Because *Ruvalcaba* found the per se rule of *Mimms* applicable to passengers, the court said it need not address the argument that the officers had "compelling reasons in this case" for having Ruvalcaba step out of the car. Nevertheless, the court noted that

> "the circumstances would have alarmed any officers. It was late at night, the Ruvalcaba car pulled onto a side street before stopping, and Officers Backus and Jacobs knew about some criminal history of at least one occupant." 64 F.3d at 1328.

These circumstances would have justified the minimal intrusion on the passenger under any of the diluted standards set out in the state cases that have declined to adopt the per se rule.

In *Maxwell*, the California Court of Appeal decided each case should be viewed on its own facts but expressly rejected a requirement that "the level of suspicion or cause to order a passenger to alight is the same as that necessary for a temporary detention." 206 Cal.App.3d at 1007-1008. There, the court found the officer's concern for his safety and his need to identify the driver justified the "minimal intrusion" on the passenger's liberty. *Id.* at 1010.

In *Smith*, the New Jersey Supreme Court declined to adopt a per se rule but also rejected the argument that the officer must be able to point to the specific facts that the occupants were armed and dangerous before asking them to exit.

> "Rather, the officer need point only to some fact or facts in the totality of the circumstances that would create in a police officer a heightened awareness of danger that would a warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." 134 N.J. at 618, 637 A.2d at 167.

In *Becker*, the Supreme Court of Iowa, required there be "some articulable suspicion" "concerning a violation of law by that person" or "further interference with the passenger is required to facilitate a lawful arrest of another person or lawful search of the vehicle." 458 N.W. 2d at 607.

Finally, the Maryland Court of Special Appeals upheld the lower court's suppression order because there was no

evidence that in having the passenger exit, the police had acted "out of any sense of apprehension." *Wilson*, 106 Md. App. at 54, 664 A.2d at 15. But the court only required there be "some individualized or particularized suspicion . . . . Where officer safety is concerned, the reasonableness threshold is low, but there is a threshold." 106 Md. at 48, 664 A.2d at 12.

The circumstances here -- the early morning hour, the same high-crime area where one of the officers had previously chased Ruvalcaba as a robbery suspect, and the driver choosing to pull over on a dark side street -- more than justified the officer's decision to have the driver and two passengers exit the car under any of these state's standards.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

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